Ng Yue Hong & Ors v Gan Eng Kah & Ors

HIGH COURT (SEREMBAN) – ORIGINATING MOTION NO 32-20 OF 1988
MUSTAPHA HUSSAIN J
21 NOVEMBER 1988

Administrative Law – Order of certiorari against Rent Tribunal's decision – Application for – Plaintiffs out of time in filing memorandum of appeal against Tribunal's order – Allegation of error on the record as Tribunal decided under wrong statutory provision in record of proceedings – Whether plaintiffs can have recourse to certiorari – No glaring error on the record

The first and second defendants were the landlords of certain premises and they made an application to the Rent Tribunal for an order of recovery of possession of the premises on the ground of development under s 18 of the Control of Rent Act 1966. The application was heard before the Rent Tribunal with both the defendants and the plaintiffs, who were the lawful tenants of the first and second defendants, present. At the conclusion of the hearing, the Tribunal gave a decision in favour of the first and second defendants. The plaintiffs filed a notice of appeal against the decision of the Rent Tribunal within the prescribed time but failed to file the memorandum of appeal within time. The plaintiffs' request for extension of time was refused and under r 10(2) of the Control of Rent (Negri Sembilan) (Rent Tribunal) Rules 1967, the plaintiffs were deemed to have withdrawn the appeal and the decision of the Rent Tribunal deemed to be final. The plaintiffs then filed a notice of motion seeking an order of certiorari to quash the Rent Tribunal's order on the ground that there was an error on the record in that the Tribunal decided on the landlords' application on the basis of decontrol under s 23 of the Control of Rent Act 1966. The learned legal adviser representing the third defendant, the Rent Tribunal, raised a preliminary point of law by contending that the plaintiffs should have proceeded by way of an appeal.

Held, dismissing the application:

(1) Though the plaintiffs need not wait to exhaust their right of appeal to come to the court for certiorari, the plaintiffs in this case did exercise their rights to appeal but when found to be out of time to file the memorandum of appeal, scrutinized the record of proceedings before the Rent Tribunal and filed this notice of motion of certiorari.

(2) It cannot be said that there was a glaring error on the record to seek immediate intervention of the court and order for certiorari to prevent irreparable damage or harm if the proceedings were to continue.

[*Editorial Note*: The plaintiffs have appealed to the Supreme Court vide Civil Appeal No 401 of 1988.]

Cases referred to

1 *Government of Malaysia & Anor* v *Jagdis Singh* [1987] 2 MLJ 185 (refd)
2 *Land Executive Committee of Federal Territory* v *Syarikat Harper Gilfillan Bhd* [1981] 1 MLJ 234 (refd)
3 *Lai Cheng Cheong* v *Sowaratnam* [1983] 2 MLJ 113 (distd)

Legislation referred to

Control of Rent Act 1966 ss 18, 23
Control of Rent (Negri Sembilan) (Rent Tribunal) Rules 1967 r 10(2)

Leow Shin Fong for the plaintiffs.
Lim Kem Thuan for the first and second defendants.
Abu Samah bin Nordin, State Legal Adviser, for the third defendant.

Cur Adv Vult

Mustapha Hussain J: The four plaintiffs herein filed a notice of motion seeking an order of certiorari to quash an order of the Rent Tribunal for the District of Seremban, the third defendant here, dated 24 October 1987, in respect of premises No 5, Jalan Dato' Sheikh Ahmad, Seremban (hereinafter referred to as the 'said premises').

The four plaintiffs claimed that they are the lawful tenants of the first and second defendants, the landlords. On 18 April 1987 the landlords made an application to the Rent Tribunal for the District of Seremban for an order of recovery of possession of the said premises on the ground of development under s 18 of the Control of Rent Act 1966.

The application was heard before the Rent Tribunal, with all the parties present and both parties the plaintiffs and first and second defendants represented by counsel, on 24 October 1987, and at the conclusion of the hearing the Tribunal gave decision in favour of the landlords, the first and second defendants.

The plaintiffs' application is based on the ground that when they received the record of proceedings before the Rent Tribunal the plaintiffs discovered that there was an error on the record in that the Tribunal proceeded with the landlords' application and decided on the basis of decontrol under s 23 of the control of Rent Act 1966. The decision of the Tribunal reads:

> The Rent Tribunal after hearing submissions from both counsel decided to approve the applications for the decontrol under s 18 of the Control of Rent Act 1966. The application for the certificate is hereby approved and granted to the applicants. Compensation is four years' rentals.

The draft of the order made by the Rent Tribunal was approved and signed by plaintiffs' counsel who represented them before the Tribunal throughout the whole hearing.

The plaintiffs filed the notice of appeal against the decision of the Rent Tribunal on 12 November 1987 within the prescribed time but failed to file the memorandum of appeal within ten days from the date of service of the record of proceedings and grounds of decision on the plaintiffs, ie within ten days of 16 February 1988, on which date the record was served on the plaintiffs' new solicitors.

The new solicitors for the plaintiffs then requested, solicitors for the first and second defendants for extension of time within which to file the memorandum of appeal which was refused. Under r 10 (2) of the Control of Rent (Negeri Sembilan) (Rent Tribunal) Rules 1967,

the plaintiffs shall be deemed to have withdrawn the appeal and the decision of the Rent Tribunal shall be deemed to be final.

With that one would expect the whole matter to rest.

The only recourse now open to the plaintiffs is by way of certiorari to quash the order on what the plaintiffs think is an error on the record.

The learned legal adviser, representing the third defendant, raised a preliminary point of law. He contended that the plaintiffs should have proceeded by way of an appeal. The law here is very clear. (See *Government of Malaysia & Anor* v *Jagdis Singh*[1] and *Land Executive Committee of Federal Territory* v *Syarikat Harper Gilfillan Bhd.*[2]) Of course, the plaintiffs need not wait to exhaust their right of appeal to come to the court for certiorari (see *Lai Cheng Cheong* v *Sowaratnam*[3].) But then, in our case, the plaintiffs did exercise their rights to appeal, but when found to be out of time to file the memorandum of appeal, scrutinized the record of proceedings before the Rent Tribunal and filed this notice of motion for certiorari.

It cannot be said here that there was a glaring error on the record to seek immediate intervention of the court and order for certiorari to prevent irreparable damage or harm if the proceedings were to continue, as envisaged by *Lai Cheng Cheong's* case.[3] That is not the situation here. The plaintiffs found they had failed to file the memorandum of appeal within the prescribed time limit and out of time. There was no other way out. One would have thought, after being out of time, the plaintiffs would have applied to the court for extension of time to file the memorandum of appeal. Probably there were no grounds to support such an application.

The authorities cited earlier are quite clear and this court upheld the objection raised by the learned state legal adviser and hence the application of the plaintiffs was therefore dismissed with costs.

Application dismissed.

Solicitors: *Arifin & Partners* ; *Gill & Tang* .

Reported by *Ng Sheau Jiuan*

United Asian Bank Bhd v The Negeri Sembilan Development Corporation

HIGH COURT (SEREMBAN) – CIVIL SUIT NOS 23-255 OF 1986 AND 23-256 OF 1986
MUSTAPHA HUSSAIN J
19 NOVEMBER 1988

Banking – Guarantee – Amendment Act introduced provision prohibiting defendant from entering into any guarantee – Provision to have retrospective effect – Guarantee given prior to amendment Act but affected by its retrospective operation – Whether defendant still liable on guarantees – Incorporation (State Legislatures Competency) Act 1962, ss 2, 4(a), (b), Second Schedule para 14(1)(d)

Statutory Interpretation – Amendment Act introduced provision prohibiting defendant from entering into any guarantee – Provision to have retrospective effect – Guarantee given prior to amendment Act but affected by its retrospective operation – Whether retrospective operation to be given to statute so as to impair existing right or obligation – Language to be very clear

The defendant gave a number of letters of guarantee to the plaintiff bank in consideration of the plaintiff opening and continuing to maintain an account for two companies in which the defendant was the major shareholder. The period covered by the guarantees was from 1974-76. The companies went into liquidation and the plaintiff bank claimed against the defendant as guarantor. The senior assistant registrar dismissed the plaintiff bank's application for summary judgment and leave was given for the defendant to defend. The plaintiffs appealed against this decision.

In the appeal, the defendant argued that the Incorporation (State Legislatures Competency) Act 1962 was amended in 1981 whereby certain provisions of the Act were given retrospective effect, which covered the period of the guarantees. The amendment laid down that no corporation shall, without the prior consent in writing of the Minister of Finance, enter into any guarantee involving financial liability, and as such, the defendant, argued, there was no liability on the guarantees issued by them.

Held, allowing the appeal:

(1) During the period 1974-76, the law in force vis-à-vis the defendant was s 17B of the Negri Sembilan Development Corporation Enactment 1969 (Negri Sembilan Government Enactment No 4 of 1969) which stated that 'the Corporation shall not stand as guarantor to any loan ... made by any person to any organization except to an organization in which the Corporation has a commercial interest ...'. Clearly, the defendant has no defence at all on the guarantees given. The defendant has the commercial interest in the two companies, in whose favour the guarantees were issued.

(2) A retrospective operation is not to be given to a statute so as to impair an existing right or obligation or otherwise than as regards matters of procedure, unless the language is very clear and capable of only one meaning in that it is retrospective. It is most unfair to resort to retrospective Enactments just to avoid a party's legal obligations.

(3) In the present case, nowhere is there a clear provision in the amendment Act making it retrospective the taking away of an existing right or abolishing an existing obligation.

[*Editorial Note*: The defendant has appealed to the Supreme Court vide Civil Appeal No 406 of 1988.]